IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 31 OF 2005

Mr. Bernard @ Bhendo Cardoz
s/o Milagres Cardoz, r/o H. No.248,
Guirdolimli, Chandor, Salcete, Goa.
Presently undergoing sentence at
Sub-Jail Sada through next friend
Francisco Savio Vaz. ... Appellant

versus

S T A T E ... Respondent

Mr. Arun Bras De Sa, Advocate for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 1ST MARCH, 2007.

ORAL JUDGMENT

This appeal is by accused no.2/Bernard alias Bhendo Cardoz in Sessions Case No.11/2002 who has been convicted and sentenced under Section 392 r/w 397 I.P.C. by the learned Additional Sessions Judge, Margao by his Judgment/Order dated 27-7-2005.

2. Some facts are required to be stated to dispose of the present appeal.

3. After PW9/ Babu Bandekar had filed his complaint, the case was investigated by PW32/PSI Manjunath Dessai and five accused were sent for trial. To start in reverse order, A-5/Pascoal Estibeiro has been acquitted by the trial Court under Section 411 I.P.C. for which earlier charge was ordered to be framed against him. A-4/Justin D'Cunha was discharged by the Court of Sessions by Order dated 4-9-2002 which order was upheld by this Court, by Order dated 20-6-2003. A-3/Carlos Cardozo was also convicted by the same Judgment but absconded before he could be heard on the point of sentence. A-1/Alex Fernandes was also convicted and sentenced but by Order dated 23-2-2007 his conviction and sentence was set aside by this Court for want of jurisdiction to try him, as he was a juvenile in terms of the Juvenile Justice(Care and Protection of Children) Act, 2000.

4. The aforesaid accused came to be charged and tried with an allegation that on 14-6-2001 at about 18.00 hours at Kostimoll, Sanguem, the first three accused forcibly stopped the pick-up belonging to and driven by the complainant PW9/Babu Bandekar, who was proceeding towards Sanguem, and thereafter snatched the gold chain which the complainant was wearing and took away a resin bag containing cash of Rs.70,000/- to Rs.80,000/-, his driving license and keys of the said pick-up by causing grievous hurt to him and his son PW14/Vikram thereby committing offences punishable under Section 392 r/w 397 I.P.C.

5. In the trial of the accused, prosecution examined 32 witnesses out of which five witnesses turned hostile to the case of the prosecution. As far as this accused no.2/Bernard alias Bhendo Cardoz is concerned, the evidence of PW1/Robert Dias, PW2/Newton Viegas, PW5/Shiva R. Naik, PW9/Babu Bandekar, PW14/Vikram, PW19/Vilas Ballikar, PW21/Chandrahas Naik, PW23/Prakash Naik, PW28/Jose Fernandes, PW31/Hanumant Patil and last but not the least PW32/Manjunath Dessai is of importance, relevance and significance.

6. As per the version given by PW9/Babu Bandekar he was dealing in liquor and was supplying liquor to bar owners at Sanvordem. He stated that he had his own pick-up bearing No.GA-02/TU-7624. He stated that on 14-6-2001 he started from his house at Xeldem where he has also his godown and then reached Kostimoll on the way to Sanvordem at about 5.30 p.m. According to him, his son Vikram Bandekar/PW14 and his employee by name Hanumant Patil/PW31 were present in the pick-up and when he reached near a slope near Kosti, three persons came on a scooter from his rear side and overtook his vehicle and blocked the same. According to him, two of the persons from the scooter got down, one of whom was short(who was later identified by PW31/Patil as A-3) and the other tall(who was also later identified by PW31/Patil as A-2). As per him, the short person abused him in filthy language, removed the key of the pick-up and came towards the driver's side and the tall person went to the cleaner's side, and the short person opened the door from his side and removed the key of the pick-up and then pulled him out by holding his shirt and removed him out by pulling his shirt and then twisted his right hand due to which he sustained a fracture and he also pulled his

gold chain which broke into two pieces and which he kept in his pant pocket and the tall person gave a fist blow on the face of his son PW14/Vikram due to which the said Vikram sustained a bleeding injury and thereafter the tall person pelted stones on the glass on the cleaner's side due to which the glass was broken and thereafter he asked the said persons as to why they had started pelting stones and at that the said short person gave a fist blow on his stomach and when he went to help his son Vikram one of them hit on his back with a kick and then the short person removed the bag containing cash which was kept on the rear side of the seat and though he tried to snatch the said bag from his hand he did not succeed as he hit him with kicks and pushed him down and in that process the belt of the said bag had remained in his hand but the bag was snatched away by the said person which had cash of more than Rs.70,000/- being the day's collection. He described the person who was sitting on the scooter as short, of about 5 feet in height and of dark complexion. According to him, the second person was slightly taller and was above 5 feet and the third person was still taller of about 5.5 feet.

7. PW14/Vikram has corroborated the version given by his father. However, the fact remains that the present accused no.2 was arrested only on 28-12-2001 and after his arrest no T.I. parade was held with a view to get him identified either by PW9/Babu Bandekar, PW14/Vikram or PW31/Hanumant who were present in the said pick-up. Neither PW9/Babu nor PW14/Vikram identified A-2/Bernard before the Court and the only person who apparently identified A-2/Bernard is PW31/Hanumant Patil, whose evidence shall be referred to a little later.

8. PW2/Newton Viegas is the friend of A-1/Alex Fernandes and also of PW1/Robert Dias. According to him, he had handed over his scooter of blue colour bearing No.GA-02-K-7299 to A-1/Alex Fernandes and on the next day had asked him about it and he was told that they were near a bar at Sirlim and therefore he went there on his scooty and there he met A-1/Alex Fernandes, PW1/Robert Dias and A-4/Justin who were present along with three other friends. He stated that he was introduced by A-1/Alex Fernandes to his other three friends by their names which he did not recollect. He was cross-examined by the prosecution and although in the cross-examination by the prosecution he admitted that he had come to know one Bhendo for the first time on that day in the bar he was unable to identify him amongst the accused persons in the Court. His evidence therefore is of no help to the prosecution to prove the case against A-2/Bernard.

9. PW19/Head Constable Ballikar stated that he was on duty at the Sanguem bus stop, between 7.00 a.m. to 8.00 p.m. when at about 6.00 p.m. He saw a Vespa Scooter blue in colour coming from Sanguem side and going towards Sanvordem side and three persons riding the same and it was been driven in a fast speed. He stated that accused nos.1, 2 and 3 were the said persons whom he identified after they were brought to the Police Station, after about 3 to 4 days of the incident. In cross-examination, it was specifically put to him that A-2/Bernard was arrested after about 6 months and he stated that he did not remember whether A-2/Bernard was present at the Police Station at that time. The evidence of PW19/Balliker is far from convincing. His statement that he saw A-2/Bernard after about 3 to 4 days at the Police Station is a false statement and therefore his

evidence cannot connect the accused to the crime. His evidence cannot be used against A-2/Bernard.

10. As per the prosecution, PW1/Robert Dias is the person who drove accused no.2/Bernard and accused no.3/Carlos for the commission of the offences. PW1/Robert Dias was tendered pardon on 16-7-2001 by the learned Chief Judicial Magistrate, Margao. Subsequently, his statement was recorded under Section 164 of the Code of Criminal Procedure, 1973 by the SJM PW3/Shri Faria on 15-9-2001 and he was examined before the Committal Magistrate on 6-2-2002 and his examination was completed on 26-3-2002. As PW1/Robert Dias did not adhere to the statement given by him and recorded under Section 164 of the Code he was cross-examined by the prosecution. In other words, PW1/Robert Dias at the time of recording of the statement before the Committal Court under Section 306(4) of the Code had resiled from the statement earlier given to the SJM PW3/Shri Faria and yet he continued to be a witness.

11. A pardon is granted on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. The grant of pardon carries an imputation of guilt and an acceptance thereof a confession of it. A pardon has been defined as an act of grace which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is in substance and effect a contract between the State on the one hand and the person to whom it is granted on the other hand.

A general power to grant pardon carries with it the right to impose conditions limiting the operation of such pardon.

12. Although, PW1/Robert Dias had resiled his earlier statement given to the SJM PW3/Shri Faria and had broken the contract of granting pardon yet he was not prosecuted as an accused but continued to be a witness for the prosecution. As far as the evidence of an approver is concerned, the learned trial Court had referred to the case of **Ram Prakash** v. **State of Maharashtra**(1999 Cri.L.J. 2889) wherein the Apex Court had observed that there is no legal hurdle against acting on the testimony of an accomplice. It is well settled that it would be imprudent to base such conviction on such testimony unless it is corroborated in material particulars. The evidence of such an accomplice has to pass the test of reliability and must secure adequate corroboration before the same can be acted upon. The learned trial Court has found the evidence of PW1/Robert Dias as reliable even though he had resiled from the statement given by him earlier when his statement was recorded before the Committal Court under Section 306(4). The learned trial Court has accepted his explanation for resiling because A-4/Justin had given him a threat. The learned trial Court has also observed that the version given by PW1/Robert Dias was upto the stage of the episode narrated by him that is to say when all of them had talked about stopping of a pick-up carrying liquor and it was decided that A-1/Alex Fernandes, A-2/Bernad Cardozo and A-3/Carlos would chase the said vehicle and go ahead for blocking the same. The learned trial Court has rightly observed that the version of PW1/Robert Dias was only relevant upto that stage and not regarding the actual commission of offence. In fact, PW1/Robert Dias had conceded that he

had not seen the pick-up nor he had seen A-1/Alex Fernandes, A-2/Bernad Cardozo and A-3/Carlos actually following the said pick-up. The evidence of PW1/Robert Dias shows that he was arrested on 19-6-2001 and was released on bail after two or three days. He also had admitted in his cross-examination that on 6-2-2002 when his statement was recorded before the Sanguem Court he had stated that he did not know A-1/Alex Fernandes, A-2/Bernard Cardozo and A-3/Carlos as well as A-4/Justin and A-5/Pascoal and that he had disclosed that he did not know anything about the said matter. He had also admitted that the Police Officers had given him threats of putting him behind bars for seven years if he failed to state as per their wish before the SJM. If PW1/Robert Dias was on bail at the time when his statement under Section 164 of the Code was recorded on 15-9-2001 or when his statement before the Committal Court was recorded on 6-2-2002, 4-3-2002, 8-3-2002 and 26-3-2002 the incident of threat being given as can be seen from application dated 2-10-2001-Exh.34 shows that it took place on 28-9-2001 when PW1/Robert Dias had attended the Court of J.M.F.C. in a theft case and when A-4/Justin and A-1/Alex Fernandes were present in that Court. The records and proceedings of C.C.No.265/S/2002 which was committed to the Court of Sessions and from which this appeal arises do not show that the said case was taken up on 28-9-2001 before the Committal Court. If PW1/Robert Dias was threatened in Court on 28-9-2001 he could have always complained to that Court on that date. Similarly, he could have complained on 6-2-2002 when he was taken for recording his statement under Section 306(4) of the Code. His statement that he had lodged the the complaint against A-4/Justin during recording of his statement is incorrect. Neither the evidence of PW1/Robert or the I.O. shows that any action was taken on

the said complaint which was brought out only in his cross-examination. The evidence of PW1/Robert shows that he had given two different versions at two different stages and therefore would be unworthy of credit.

13. PW31/Hanumant Patil as per the case of the prosecution was sitting in the middle of the cabin in between the complainant/PW9/Babu Bandekar and his son PW14/Vikram. As per him, they reached Kosti at about 5.30 to 6.00 p.m. where there are only jungle trees and not any houses when a scooter came with three persons and two persons got down from the scooter out of which one person was tall whom he has identified as A-2/Bernard and the other as short whom he has identified as A-3/Carlos. According to him, the short person(A-3) came from the driver's side and started abusing PW9/Babu Bandekar and then removed the key of the pick-up and pulled him out and then tried to pull the bag which was on the seat which PW9/Babu Bandekar tried to resist and at that time the short person(A-3) assaulted PW9/Babu Bandekar on his stomach and the tall person(A-2) came from the left hand side and assaulted PW14/Vikram on his face and due to the assault PW14/Vikram's teeth were dislocated and he lost his consciousness and the third person(A-3) twisted the right hand of PW9/Babu Bandekar when he was pulled out of the pick-up. According to him, the number of the scooter was not visible for it was of blue colour since the portion of the number had black substance towards it. He admitted in cross-examination that he was not touched nor assaulted by anyone nor abused nor threatened. He also admitted that he saw the accused persons for the first time on the day of incident but he did not know them prior to it. He identified all the first three accused, namely Alex Fernandes as A-1, Bernard as A-2 and Carlos

as A-3. The learned Counsel on behalf of the accused has submitted that no T.I. parade after the arrest of A-2/Bernard on 1-1-2002 was conducted and therefore the evidence of identification of PW31/Hanumant Patil for the first time in Court on 20-11-2004 could not have been accepted. The learned Counsel has placed reliance on **Kanan and others** v. **State of Kerala**(AIR 1979 SC 1127) wherein the Apex Court has stated that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T. I. parade to test his powers of observation. The idea of holding T. I. parade under Section 9 is to test the veracity of the witness on the question of capability to identify an unknown person whom the witness had seen only once. If no T. I. parade is held then it would be only unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court. The learned trial Court observed that this witness was cross-examined at length however, no material contradictions have been brought on record. The learned trial Court further observed that this witness was not assaulted nor there was any resistance from him since he was sitting in the middle cabin and as far as this position is concerned no fault could be found with the same. The learned trial Court also observed that the incident had taken place between 5.30 to 6.00 p.m. In the month of June and particularly on 14th June and therefore the possibility of not seeing the faces of the accused persons by him due to lack of natural light would be ruled out. The learned trial Court also noted that in the month of June the normal time of sun set in this State is after 6.30 p.m. and it was no one's case that at the relevant time it was raining and there was no sufficient light to see the faces of the accused persons and therefore the learned trial Court came to the conclusion that

PW31/Hanumant Patil corroborated the versions of PW9/Babu Bandekar as well as PW14/Vikram.

14. As far as the versions of PW9/Babu Bandekar and PW14/Vikram are concerned, it is not the case of the prosecution that either of them identified A-2/Bernard as the tall person who had assaulted PW14/Vikram and in fact no T. I. parade was held after A-2/Bernard was arrested on 28-12-2001. However, the learned trial Court completely lost sight of other facts stated by PW31/Hanumant Patil in his cross-examination. The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. The identification proceedings are in the nature of tests and significantly there is no provision for it in the Code or in the Evidence Act. As stated by the Apex Court in **Malkansingh and others** v. **State of M.P.**((2003) 5 SCC 746) the T. I. parades do not constitute substantive evidence. The substantive evidence is the evidence of identification in Court and the T. I. parade provides corroboration to the sworn testimony of the witnesses in Court as to the identity of the accused. In appropriate cases, the Court may accept the identification in Court even without necessity of such or other corroboration. Normally and considering the situation in which PW31/Hanumant Patil was placed, his identification ought to have been accepted. However, the learned trial Court completely lost sight of what PW31/Hanumant Patil stated in his further cross-examination. PW31/Hanumant Patil had admitted that the incident had taken

place during evening time and it was dark at that time as on both sides of the road there was a hillock. If, PW31/Hanumant Patil had himself admitted that it was dark the learned trial Court certainly could not come to the conclusion that it was bright, being 14-6-2001. Not only that, PW31/Hanumant Patil had also stated that there were no street lights at that place and that accused no.2 was having something on his face but he did not recollect whether it was the mask or other substance. If, A-2/Bernard had masked his face or had put some other substance, at the time of the alleged incident, in my view, the subsequent identification for the first time by PW31/Hanumant Patil could not have been accepted as free from doubt. The case of the prosecution that the identity of A-2/Bernard was established as the person who assaulted PW14/Vikram could not have been accepted.

15. That takes us to the evidence of recovery of the key purported to be that of the pick-up of PW9/Babu Bandekar and the bag which belonged to him and which according to the three witnesses who were present, namely PW9/Babu Bandekar, PW14/Vikram and PW31/Hanumant Patil were snatched by the short person who in the circumstances of the case could not be no other than A-3/Carlos. As per PW32/P.I.Manjunath Dessai he interrogated A-2/Bernard on 1-1-2002 and the statement made by him voluntarily was recorded in the first part of the panchanama and thereafter led them to the scene of offence. According to him, the accused first led them near the scene of offence and showed the place where the key of the pick-up was thrown and later to Ghadiwada, Kakoda and pointed out the lake and thereafter the resin bag was shown which was by the side of the lake and which was brought by one Constable which was totally soiled. According to him,

when the bag was searched they found a piece of yellow metal which was lying on the extreme left hand side of the bag. He also found two delivery challans in the said resin bag in the name of the customer that is to say Babu Bandekar and the same were found to be wet. PW23/Prakash Naik is the panch witness examined to support the said panchanama.

16. As far as the second part of the panchanama is concerned, PW23/Prakash stated that they proceeded to that place as per the direction given by the accused no.2/Bernard and stopped the jeep near the crematorium and went inside it where there was a small pond. In one breadth he stated that A-2/Bernard showed them one bag which was lying near the said pond but not in the water which was of black colour and of resin. In another breadth he stated that one Constable went near the said bag and brought it and after opening it they found two challans, in the first compartment and in the third compartment they found one piece of yellow metal. A conjoint reading of the evidence of PW5/Shiva Naik, PW23/Prakash Naik and the I.O. shows that on 20-6-2001 at the instance of A-1/Alex, PW5/Shiva and the I.O. had been to the pond by the side of crematorium where 2/3 envelopes and a small diary was found and amongst the persons gathered there was one Prashant G. Gaonkar. The evidence of I.O. shows that on that day he knew through A-1/Alex that the bag was thrown in the pond but had not called any diver to fish out the said bag. He has further admitted that he knew that the resin bag was in the pond from 20-6-2001 to 1-1-2002. If the I.O. knew where was the bag six months before prior to it being found by one of the constables on being searched I fail to understand as to how A-2/Bernard could be connected with it. It is of dubious character and could

not be accepted as a circumstance to connect A-2/Bernard with the offence. That apart, the fact that any of the accused would have thrown the bag with a piece of gold chain in the water of the pond is itself difficult to accept. Moreover, this was a bag which had a handle but according to the case of prosecution its handle had fallen at the scene and attached subsequently and when the I.O. was confronted with this situation, he could not give any plausible answer. That takes us to the key which according to the prosecution was recovered only on 1-1-2002. As per PW23/Prakash, A-2/Bernard told them while they were returning towards Sanguem from the spot of the incident, the key of the vehicle was thrown towards western side towards the cashew tree and thereafter along with the accused they proceeded towards Kosti and the key was found by accused no.2/Bernard himself which was lying near the cashew tree. In cross-examination, he has admitted that the P.I. had not questioned the accused as to where he had concealed the bag and the key. He also stated that accused no.2/Bernard did not disclose that he was ready to show the said key or the said resin bag. Although the said key has been identified by PW9/Babu Bandekar, the said identification is not free from doubt. Firstly, the said key was not attached to any key chain. The said key had remained in sun and rain for six months. There is not any whisper whether it had become rusty. It could be that the ignition lock of the pick-up was changed by PW9/Babu Bandekar but the said ignition lock was seized only about two months, after the key was recovered on 1-1-2002. It is also pointed out on behalf of the accused that the pick-up which was seized by the Police was taken by PW9/Babu Bandekar within a few days and there is no explanation as to how it could have been taken if the only key was lost. In fact, there is nothing in the evidence of PW9/Babu Bandekar convincingly stated

by him as to when the said ignition lock was changed and how he had moved his pick-up either from the scene or thereafter when he received its custody from Court. The recovery of the said key and its identification are not free from doubt.

17. In conclusion, it may be observed that PW1/Robert Dias was not present when A-2/Bernard and A-3/Carlos allegedly assaulted PW9/Babu Bandekar and PW14/Vikram and took away the key and the bag with cash or the chain. One does not know what happened to the remaining chain except the small piece. PW1/Robert Dias having given two versions at two different stages has further proved himself to be unreliable. Neither PW9/Babu Bandekar nor PW14/Vikram identified A-2/Bernard and the identification by PW32/P.I.Manjunath Dessai could not be accepted for reasons already stated. The recovery of the resin bag as already stated is not free from doubt and therefore no reliance could be placed on the recovery of the key as well.

18. Consequently, the accused deserves to be given benefit of doubt.

19. Hence, the appeal is allowed. The Judgment dated 27-7-2005 is hereby set aside and A-2/Bernard acquitted under Section 392/397, I.P.C. He shall be set to liberty forthwith in case he is not required in any other case.

N. A. BRITTO, J.

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